

APPEAL NO. 041429-s
FILED AUGUST 4, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 12, 2004. The hearing officer resolved the disputed issue by determining that the respondent's (claimant) impairment rating (IR) is 20%. The appellant (carrier) appeals this determination, urging that the correct IR is 10%. The appeal file contains no response from the claimant.

DECISION

Reversed and rendered.

The evidence reflects that the claimant sustained a compensable lumbar injury on _____. A radiological evaluation dated April 21, 2001, indicated, "roentgenographic studies of the lumbosacral spine with bending films reveal no evidence of acute injury." As a result of the compensable injury, the claimant underwent surgery, which included a two-level fusion, on January 20, 2002. It is undisputed that the claimant reached maximum medical improvement statutorily on March 8, 2003.

The claimant was initially examined by the Texas Workers' Compensation Commission (Commission)-selected designated doctor, Dr. V, on May 21, 2003, at which time he placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III of the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) and assigned a 10% IR. Dr. V noted in this initial report that there was no evidence of preoperative or postoperative instability. On August 19, 2003, the Commission sent a letter of clarification to Dr. V, requesting that he respond to the concerns of the claimant's treating doctor, Dr. F, regarding the IR assigned. Dr. F contended that the claimant met the requirements for DRE Category IV for loss of motion segment integrity and this, coupled with a rating for lower sacral motor root dysfunction, would yield a 24% IR. In a letter dated August 29, 2003, Dr. V confirmed that a 10% IR was correct. In another letter of clarification, dated October 6, 2003, the Commission specifically noted Advisory 2003-10, issued July 22, 2003, which provides that a multilevel fusion meets the criteria for DRE Category IV, and requested that Dr. V respond as to whether this information would cause him to change his opinion. There is no indication that a copy of the actual advisory was sent to Dr. V. In response, Dr. V amended his prior IR and assigned a 20% based on DRE Category IV.

Section 408.125(c) provides that for injuries that occurred prior to June 17, 2001, where there is a dispute as to the IR, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule

130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. See *also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. Relying on this authority, the hearing officer determined that the designated doctor's clarification was entitled to presumptive weight and that the claimant's IR is 20%.

The carrier argues that Advisory 2003-10 is invalid. However, it is not the function of the Appeals Panel to pronounce the validity of Commission advisories. Texas Workers' Compensation Commission Appeal No. 011557, decided August 7, 2001. Alternatively, the carrier argues that because Advisory 2003-10 is inapplicable in this case and, as such, the correct IR is 10%. We agree. Advisory 2003-10 provides the following clarification for rating spinal fusions:

2. Clarification of Rating for Spinal Fusion(s)

For spinal fusion, the impairment rating is determined by the preoperative x-ray tests for "motion segment integrity" (page 102, 4th Edition of the *Guides to the Evaluation of Permanent Impairment*). If preoperative x-rays were not performed, the rating may be determined using the following criteria:

- a. One level uncomplicated fusion meets the criteria for DRE Category II, Structural Inclusions. **This spinal abnormality is equivalent to a healed "less than 25% Compression Fracture of one vertebral body".**
- b. Multilevel fusion meets the criteria for DRE Category IV, Structural Inclusions, as this **multilevel fusion is equivalent to "multilevel spine segment structural compromise"** per DRE IV. [Emphasis in original.]

In the present case, roentgenograms were performed prior to the claimant's surgery and revealed no injury. As the advisory instructs, a rating for multilevel spinal surgery under subsection b is permissible "if preoperative x-rays were not performed." For these reasons, it was error for the hearing officer to adopt the amended IR of the designated doctor. Accordingly, the hearing officer's decision is reversed and a new decision rendered that the claimant's IR is 10%, in accordance with the initial IR assignment of Dr. V.

We find no merit in the carrier's argument that the burden of proof in this case was improperly placed on the carrier. The carrier argued at the hearing that given Dr. V's explanation for amending his report, he never actually changed his opinion that the claimant's IR was 10%, and since the carrier agreed that the correct IR was 10%, it did not have the burden to prove that the 10% was contrary to the great weight of the other medical evidence. However, given that the Dr. V submitted an amended report

indicating that the claimant's IR was 20%, we cannot agree that the burden of proof was improperly placed on the carrier.

The hearing officer's decision is reversed and a new decision rendered that the claimant's IR is 10%.

The true corporate name of the insurance carrier is **GREAT AMERICAN ALLIANCE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Chris Cowan
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge